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The law as a poverty fighting instrument:
reflections on law, development and
empowerment of the poor.

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I. Introduction.

There have been two approaches to the formation of law: law as an obstacle to change and law as a change promoting mechanism.

For the first approach the law is used as a defensive mechanism of the powerful elites and is intended to protect the establishment. The changes are slow and are promoted from top to bottom, not as a result of consensus or of a natural evolution of the order of human interactions, but as a result of imposition by the ruling elites. Many practicing lawyers then make up their livings defending those rules.

But where the law is static, the society is dynamic. What yesterday was order today can be chaos. Thus, the law needs to be constantly accommodated for the changing realities of the human continuum. The second approach on law formation intends to use the law as a mechanism that creates opportunities for those at the bottom to be able to make a better

living. In this sense the law is not conceived as an obstacle to change but rather a representation of the order that flows from the bottom to the top. And more importantly, the law is understood as an instrument that eliminates the asymmetries of the society, so that the basic universal rights can truly be enjoyed by the majority.

In the sense of the second approach we insert the concept of law and development. Hence, aside from ideological connotations, law and development as a study discipline purports to promote not only legislative interventions by way of highlighting the international best practices, but also to promote legal services under the form, for example of legal education, to make effective the legal rights.

Evidence shows that although the poor have the capacity to make progress, they usually lack the legal instruments to use it. An illustrative example of that has been the finding that the poor have hidden economic resources in the form of assets that are not recognized by the formal legal system. Historic experiences have proved that given certain rights and conditions the poor can create wealth. But the majority of countries have been negligent in creating the framework where minimum rights and conditions are guaranteed to empower the poor.

Thus, poverty should be understood as deprivation of capabilities and opportunities rather than solely a function of income. The law can be instrumental on reversing that, not only by recognizing title to land but by providing the actions and processes that grant the poor

legal capacity to take advantage of the opportunities that can release their economic potential. That includes legal reforms to recognize right but is more than that.

Through law, people can be empowered, not necessarily in terms of taking power from one group and granting it to other, but by creating the conditions and opportunities where the rights can be enforced. Empowerment is commonly defined in the literature of economic development as “the process of enhancing an individual’s or group’s capacity to make purposive choices and to transform those choices into desired actions and outcomes.”¹ This involves strengthening the ability of actors to choose options, and the ability to structure the rules.

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The author was part of a team of consultants that produced two documents for the United States Agency of International Development (USAID) on legal empowerment of the poor. They are: USAID, Legal Empowerment of the Poor: From Concepts to Assessment, March 2007; USAID, Land and Business Formalization for Legal Empowerment of the Poor, strategic overview paper, January 2007. Many of the information vested in this paper comes from those documents. Some portions of this paper were presented at the University of Oslo Academic Network on Legal Empowerment of the Poor in Oslo, Norway in October, 2007. The author alone is responsible for any statements made herein.

¹ Alsop, Ruth, Mette Bertelsen, and Jeremy Holland. 2006. Empowerment in Practice: From Analysis to Implementation. Washington, DC: The World Bank.

II. Legal empowerment of the poor.

Legal empowerment of the poor (LEP) is not a process: it is so and a goal. It is the process through which the poor's potential is released, but it should also be a goal by itself, for without it, the task of poverty alleviation will be incomplete.

Some of the premises upon which legal empowerment of the poor is based can be summarized as follows:

- Laws can be obstacles but are also instruments to release the potential of the poor;
- The poor can be empowered by legal means, such as legal reforms, but legal empowerment should be broader than that;
- Through different mechanisms the poor can be empowered to use legal means, such as by participating in the making of the law;
- The actions that empower the poor are beneficial to all the society;
- Legal empowerment of the poor has at least four components: a) rights enhancement, whereby rights are created by law; b) rights awareness, whereby the poor gain knowledge of their rights; c) rights enablement, whereby the poor are assisted in using the law; d) rights enforcement, whereby pathways are provided for the rights to materialize²;

² USAID, Legal Empowerment of the Poor: From Concepts to Assessment, March 2007

- Legal empowerment of the poor is not a silver bullet against poverty but it has proved useful to improve the lives of many.

IV. What are the obstacles to LEP?

- Lack of economic growth.

The main obstacle to empower the poor is the lack of economic growth. It is often said that economic growth is necessary to properly fight poverty. By making the economy grow jobs are created and through that many people are provided with means to leave poverty. The share of India's population living on less than \$1 a day fell from 42% in 1993 to 35% in 2004. During the same period China saw a fall from 28% to 11%, largely thanks to faster growth. Likewise in Mexico the economy grew by 4.8% in 2006 and created 900,000 new jobs.³

However recent evidence shows that economic growth is not sufficient. Not only in many countries where growth has diminished poverty conditions have remained to restrict the release of the poor's potential, but inequality has increased creating the threat of social unrest. For example, in almost all Latin America the GDP has grown an average of 5% annually in the last 10 years, which has meant a real growth of the per capita GDP of 95%. Yet whereas in the eighties there were 120 million poor in the region, twenty years

³ The Economist, August 11, 2007 at 36.

later the figure was 220 million,⁴ and 360 million in the last year, although it is estimated they have a cumulative purchase capacity of \$ 510 billion per year.⁵ Moreover, according to the World Bank, the richest one-tenth of the population earn 48% of the total income, while the poorest tenth earn only 1.6%, the research team found. In industrialized countries, by contrast, the top tenth receive 29.1%, while the bottom tenth earns 2.5 %.⁶

- The myth of economic growth.

Thus, economic growth needs to be accompanied with more conditions to empower the poor. In many cases, economic growth takes place in countries where there is a weak unfriendly business climate. For example, when there is a price increase in commodity markets and the State owns the natural resources wealth is generated and the economy grows but the business climate can remain in bad conditions. In those circumstances businesses can face different kinds of obstacles such as expensive and long procedures to register, unawareness of process to formalize, lack of capacity to compete in the formal market, lack of access to credit, corruption and lack of incentives to be part of the formal economy. As a consequence the poor find it more efficient to remain informal and thus face the consequences not only of not having access to the usually more lucrative formal market but also of the larger global market.

⁴ Williamson, John. "Did the Washington Consensus Fail?" Outline of Remarks at CSIS. Washington DC: Institute for International Economics, November 6, 2002. Also, Cano Tamayo, Xavier, Burying the "Washington Consensus" at <http://www.globalpolicy.org/socecon/bwi-wto/imf/2003/0226bury.html>

⁵ Inter-American Development Bank, Building Opportunity for the Majority, 2006

⁶ Inequality in Latin America & the Caribbean: Breaking with History?, World Bank, 2003

Informal businesses might fail to grow due to lack of financing. In general, businesses grow from investments made out of the entrepreneurs' own funds, investors' funds, or credit. In the case of the informal businesses, those three options are limited. The entrepreneurs' own funds are dearth and mostly devoted to survival matters such as housing and meals, which take priority to business financing. If something is left, it can be invested in the business. In absence of funds to invest in the business, most informal entrepreneurs rely on loans from family. On the other hand, the lack of formalization hinders the possibility of investors financing businesses. Investors take risks and wait for investments to yield returns, but they need certainty. Investors usually invest in businesses through bonds or stocks either privately or publicly through exchange markets. When the business is not registered, when there is no information about that business, when there is no legal framework for equity investments in businesses entities, and when there is no stock exchange market, the investors fail to make investments in others' businesses, and those businesses miss the opportunity to finance their operations through other parties' investments.⁷

Similarly, in many countries credit is scarce. In Brazil, for example, the stock of credit was 21% of the GDP in 2002, although it has risen to 32% in the last year. In other countries the credit is expensive and due to the high risk of default and the weak dispute resolution mechanisms, it is frequently only available if a security is granted. The legal systems usually are devised in a way that only real property securities are available. As a

⁷ USAID, Land and Business Formalization for Legal Empowerment of the Poor, strategic overview paper, January 2007 at 49 and 54.

consequence only those that legally own land can have access to credit. In Honduras, where only 14% of the population has an undisputed title to land,⁸ it means that access to credit is restricted.

But title to land is not only important for accessing credit. She who owns a land has a tangible wealth that can be traded or exchanged in the market which makes the economy grow. In turn, trading real property can be made to satisfy personal needs such as health emergencies, something of high importance in countries where there is no system of public health assistance. Moreover, the protection that the legal system provides to those who own land means that they do not need to leave a person –usually a family member-- permanently protecting its possession against invasion; a factor that frees time that can be devoted to productive activities including the education of the children. In a 2005 study conducted among squatters in Argentina, empirical evidence revealed that 8% of the adolescent girls in titled households got pregnant compared with more than 20% in the untitled households. Likewise children from 5 to 13 years old in titled households had lower rates of school absenteeism and completed about one-half year more of school than their untitled counterparts.⁹

Moreover, the importance of procedural rights cannot be underestimated. In some instances several rights are recognized to the poor but cannot be enforced. Difficulties in the right adjudication system both at the administrative and at the judicial level are

⁸ USAID, CAFTA-DR Commercial Law Assessment Honduras, 2004.

⁹ Galiani, Sebastian and Ernesto Schargrotsky. 2006. “Property Rights for the Poor: Effects of Land Titling”, mimeo, UTDT. See also, Moffett Matt, Barrio Study links land ownership to a better life, Wall Street Journal, November 9, 2005.

paradigmatic of a de facto denial of rights. For example, the lack of documented identity means that certain rights cannot be enforced.

Additionally, the courts may be ineffective or corrupt, or the justice system may be hopelessly complex with arcane and time-consuming processes and inability to enforce the rights or not necessarily designed to deal with the needs of the poor. As a result the poor remain in disadvantage, for when the judicial systems are inefficient, unprofessional, and unpredictable, the risk and costs of being exposed to them are so high that the poor opt out for different dispute resolution mechanisms, in some cases customary forms but in other cases violent mechanisms.¹⁰ Likewise, poorly trained judges and lawyers and a lack of proper offices and physical infrastructure and accurate current legal information (for example, due to the absence of publication of precedents in common law systems) are factors that add to unstable legal and institutional frameworks and too often create a sense of a chaotic judicial system.¹¹

In other circumstances the poor can ignore the existence of their rights or of their procedural rights, something that often occurs in rural areas and when the rights are stated in a language different from the one certain groups command or when illiteracy prevails. The poor require comprehension of the right and concrete understanding of how

¹⁰ USAID, Land and Business Formalization for Legal Empowerment of the Poor, strategic overview paper, January 2007 at 50.

¹¹ Dakolias, Maria. 1995. "A Strategy for Judicial Reform: The Experience in Latin America," Virginia Journal of International Law, 36, 167 (1995)

to assert, protect, and ultimately affect the right.¹² The poorest may never travel beyond the outskirts of their village, town, or the section of a city in which they make their home. They may never read a newspaper, understand a radio broadcast, or access the Internet. Absent intervention, the poor's awareness of legal rights may be limited to anecdotal information gleaned from those with whom they interact in the community.¹³

Compounding the potential for receiving inaccurate and incomplete information, the poor often first learn about a legal right under stressful circumstances, such as a death in the family, land expropriation, job loss, or natural disaster.¹⁴ On top of that laws are often physically and technically inaccessible. In Bangladesh, for example, only few statutes are usually printed, leaving the law only accessible to those who pay a fee. Moreover, customary laws are typically unwritten and rarely codified. Examples of that are the customary laws governing India's tribal people, which comprise approximately 7% of the country's population, and the customary laws of African countries. Formal law may recognize the validity and jurisdiction of customary law, but the law is not reduced to writing. Nigeria's Land Use Act of 1978 allows inheritance of occupancy rights in accordance with the customary law of the area, but the principles of inheritance applied by different tribes and tribal subgroups are unwritten.¹⁵

- Labor

¹² Golub, Stephen. 2003. Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative, *Carnegie Paper* No. 41. October

¹³ USAID, Legal Empowerment of the Poor: From Concepts to Assessment, March 2007 at 20.

¹⁴ Narayan, et al. (pp. 237–246). See generally Narayan, Deepa and Patti Petesch. 2002. *Voices of the Poor from Many Lands*. Washington, DC: The World Bank.

¹⁵ USAID, Legal Empowerment of the Poor: From Concepts to Assessment, March 2007 at 20, footnote 37

The right to organize and bargain collectively is central, but equally important is the need to eradicate the opprobrious cases of working children and poorly compensated women (although eliminating these phenomena could make families worse off unless effective substitutes are provided). Similarly, many poor are self employed, but many survive on low wages, little job security, and working conditions that are often unsafe and unhealthy. Lack of education, information, and involvement in social networks combined with high vulnerability restrict their capabilities to attain a higher wage, more secure, and healthier work. Lack of rights and rights enforcement is a deterrent to exiting poverty. Onerous labor laws can also create an unnecessary burden on small business, preventing them from growing.¹⁶

- Unequal distribution of wealth

In many societies, the poor remain poor not because of the rights they have, but because those rights are confined to few assets and employment opportunities. Tenure and land reform programs are important policy and program mechanisms to broaden access to rights, assets and employment opportunities in ways that favor the poor.¹⁷

- Social deterrents

¹⁶ Id at 8.

¹⁷ Shleifer, A. and R. Vishny. 1998. *The Grabbing Hand—Government Pathologies and their Cures*. Cambridge, MA: Harvard University Press. See also Garcia-Bolivar, Omar. 2007. *Entre la Libertad y la Igualdad: Una propuesta de fortalecimiento para los pobres de Venezuela*, *Revista del Tribunal Supremo de Justicia*, No. 24. Caracas, Venezuela.

The lack of a system that guarantees law and order (and thus security) to the poor's assets and personal lives also deprives them of opportunities. Crime and violent conflict not only take away physical and human resources, but also negatively affect the flow of economic activities and decrease people's capacity to secure their rights. This is true in Colombia where violence not only strips people of their property and lives, but it paralyzes poor people's capacity to organize and defend their rights since armed groups target those who are seen organizing.¹⁸

Social exclusion can negatively affect poor people. The most obvious examples of this are rules that exclude the poor and other marginalized groups from decision making. In many countries, women are officially or unofficially excluded from participation in exercising rights that their male counterparts take for granted. The same is often true of indigenous peoples and historically disadvantaged groups. Minority status as well as lack of information on law, rules, and procedures in an accessible language can deny access to opportunities, as can enforcement institutions that are either unsympathetic.¹⁹

Whereas rule of law and social inclusion have more immediate, direct impacts on the effectiveness of legal empowerment measures, education, health and social security of the poor act to constrain or enable the poor's realization of legal empowerment and can be invested in over time to improve LEP.

¹⁸ USAID, Legal Empowerment of the Poor: From Concepts to Assessment, March 2007 at 9.

¹⁹ Sen, Amartya K. 1999. *Development as Freedom*.

Education in numerous areas and at various levels is important, but literacy is a particular problem. People that cannot gain access to information through reading will have great difficulty knowing and advocating for their rights, opportunities, and legal protection.

Unhealthy people cannot advocate for or defend their rights, let alone take advantage of opportunity. Limited public access to health services; lack of protection for the handicapped; and high rates of mortality due to epidemics, poor nutrition, and lack of clean water and affordable shelter can negatively affect any initiative designed to empower the poor.²⁰

Lack of food and income safety nets, employment protection, and pension schemes can hamper the poor in fulfilling their basic needs and securing their livelihoods. Weak social security is also a hindrance to poor people's capacity to access their rights and political participation. When faced with a high degree of livelihood risk, people find time to do little else besides ensure basic survival. They will sometimes endure rights violations if they fear that doing otherwise could compromise their survival (e.g., widows who do not complain when in-laws grab their property because doing so could put them and/or their children in an even more precarious situation).

- Political factors

²⁰ Sachs, Jeffrey D. 2005. The End of Poverty: Economic Possibilities for Our Time.

The poor are frequently excluded from rule-making and other social and political decision making processes. Limited democracy and lack of education affect the ability of the poor to effectively voice their needs. Effective participation in political processes is critical to the poor's longer-term legal empowerment. Some critical factors are:

Human Rights: While the rich have influence and connections to protect themselves from abuses by the state and private actors, the poor must rely on enforceable rights. It is not only the recognition of human rights that is needed but the real possibility of enforcing those rights through accessible and effective institutions. Political rights are of paramount importance because they are fundamental to participation in the law-making process.²¹

Lack of freedom of speech or rights to government information will deny them the information necessary to legal empowerment, and lack of freedom to organize or assemble will adversely affect participation in political processes. The poor also need ways to hold officials accountable, and they need to know how to access these accountability mechanisms.

Democratization: In the absence of democratic institutions, the poor face obstacles in the process of forming, shaping, and enforcing their rights. For rights to match with their priorities, the poor need to be able to participate in the decision making process. That is only possible with democratic institutions that provide the right to participate. This goes well beyond elections for political office, extending, for example, to the ability of

²¹ Golub, Stephen. 2003. Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative, *Carnegie Paper* No. 41. October.

peasants, workers, and small producers to organize themselves through associations, unions, and policy forums that promote and affect commercial activity. This also calls for participatory policy making institutions that include the poor and for measures that counteract often strong power imbalances that exist even in democratic political processes.

Vested Interests: While disadvantages in wealth, education, access to information and social networks challenge the inclusion of the poor in governance at various levels, those who do occupy decision-making positions or have the ear of those decision-makers often have few incentives to invite the poor to the table or to help them surmount those challenges. Overcoming this resistance is both a matter of the poor carving those spaces and altering the political landscape for themselves as well as altering the incentives and mentalities that feed the formation of interest groups and contribute to resistance.

Weak Institutions: Rights that cannot be enforced or can be only partially or conditionally enforced are not truly effective. In many cases, the responsible institutions are weak for lack of relevance, as is the situation in authoritarian regimes where institutions are only a formality. In other cases, institutions are weak because they are captured by vested interests. For example, when institutions are not independent or are controlled by a political party or interest group, the poor cannot influence the political agenda to protect their own interests. Excessive centralization of decision-making and monopolization of the political arena by existing parties have a similar effect.²²

²² Id

An intrinsic disequilibrium in many countries between the rich and poor affects and distorts the political process that defines the distribution of rights in society, how they are enforced, and ease of access to supporting institutions. This is not an outcome that the wealthy necessarily promote or espouse, but whether by purposeful design or benign neglect, the outcome for the poor is the same. In the absence of a framework that offers poor people the economic, social and political tools to secure their legal rights, poverty is much more likely to prevail.²³

V. What can we do?

In the world of economic development many disciplines tend to claim the solution to poverty. Lawyers could not be less. Unfortunately, provide the poor with legal tools to release their capacity will not by and itself solve all the problems of the more than half billion people who live with less than 1 \$ per day, but it will be help. Just as with economic growth, LEP is necessary but not sufficient to alleviate poverty. Thus, the world of economic development should insert LEP in the agenda of tasks to be undertaken to tackle poverty. No silver bullet has been found for poverty alleviation but more and more those of us involved in this field find that a comprehensive approach probably a much more secure way to successfully improve the livings of many.

A. Best practices.

²³ USAID, Legal Empowerment of the Poor: From Concepts to Assessment, March 2007 at 10.

There are many actions that can be taken to better the way the poor use their rights.

To systematically compile all those best practices is a pending task. Through our own personal experience we can summarize some:

- Economic.

Without a proper business climate, businesses of all nature will suffer. However, for large businesses the damage can be diminished, for they have options, including the possibility to operate in other markets, But small businesses are condemned to fail in a business climate loaded with excessive regulations, costs and procedures. For them the options are basically two: a) live with the burden of an awkward business climate and absorb the costs involved in lengthy procedures and in corruption and eventually fail or b) remain in the usually smaller informal economy or migrate to it in case of those businesses that have been formalized. However, some practices have proved beneficial to the poor.

Simplification of administrative procedures: Laws have been passed in different countries whereby time and steps involved in business registrations are dramatically reduced. Cumbersome entry procedures mean more hassle for entrepreneurs and more corruption, particularly in developing countries. Each procedure is a point of contact—an opportunity to extract a bribe. The cost of such systems is the forgone jobs that new firms would have created.²⁴

²⁴ World Bank, Doing Business, 2007

Affirmative silence or silence of consent: In many countries, businesses need to obtain permits from administrative entities that are slow in responding or might never respond. The excessive bureaucracy and the number of petitions usually managed by those entities make them inefficient. The user is frequently found in a position of having to wait for large periods of time without having the documents that in turn are required to continue other procedures. A good practice in this field has been the introduction in laws of provisions whereby after certain period of time if the administrative agency fails to respond it is considered that the response to the petition has been positive. Costa Rica passed a law whereby all government procedures are considered to have yielded a positive answer after expiration of the deadline with the certification of a notary public that the time has lapsed. The Kingdom of Lesotho is considering a similar law only for business registration. Spain introduced it in 2005 for construction licenses. Once the deadline for reviewing a license application has passed, the construction can automatically start construction operations.²⁵

Likewise, for businesses to be born or to grow access to capital is necessary. As mentioned, that capital is usually not in the hands of the owner of the business but with the financial institutions that demand guarantees. If the legal framework only provides for immovable guarantees or possessory collaterals, such as pawn shops, many businesses are de facto denied access to credit. Although a large portion of the literature of LEP has

²⁵ Id.

focused on the importance of recognizing title to land as a means to increase access to credit, an important part of the “dead capital” of the poor has been ignored. That is the capital comprised in moveable property, both tangible and intangible. Properties such as cars, tractors, farming equipment, inventory crops, cows, sewing machines and kitchens among others, but also accounts receivables, trademarks, leases, future harvests and livestock and even the rights in these rights known as derivatives could be given in guarantee to obtain a credit, given the proper legal framework. As a result of a system of that nature the credit offer can increase, the cost of credit can diminish and the businesses can grow without losing the possession of the assets needed to have the business moving. Albania, for example implemented a modern collateral system in 2001 which included a law on secured transactions which introduced new intangible properties that could be granted as collateral, eliminated the possessory system and created an electronic registry of guarantees. As a result the lender and the borrower work out what assets and interests can be used as collateral. An immediate consequence was that risk premiums were reduced by half and interest rates were lowered by 5%.²⁶

Access to property can be expanded. More than granting rights to land the poor can be empowered if those rights can be converted into capital. In some countries the poor are granted rights to use the land but those rights are not tradable or able to be exchanged for money or granted as collateral for credit. Full unrestricted rights to assets whether they are moveable or immovable which can be converted into capital are a much more efficient to empower the poor.

²⁶ Channell, Wade, Bringing more dead capital to life, RAFI notes, USAID, Dec 2006

That rational is also applicable to other kinds of assets. Thus not only land and business moveable property but ownership of the country's natural resources, directly or indirectly, is a mechanism that is worthwhile exploring. In many countries the people are told and they believe that they own the natural resources but no tradable right is granted. However many of the poor people of the world live in lands rich in natural resources that are controlled by the ruling elite through government ownership. Distributing among the poor shares or other form of ownership participation in state owned companies that exploit the natural resources will provide them with capital that, inter alia, can propel the expansion of small businesses. Another option is distributing titles to special funds created by governments to invest profits yielded by commodities. Distribution can be made on basis of the pensions. Norway has done something along those lines with the Petroleum fund, so has Alaska in the United States. The recent experience in Kenya is illustrative of how the poor are willing to convert their rights into capital given the right framework. The offering of Ken Gen State Owned Corporation intended to raise \$ 8 billion Kenyan Schillings, but instead raised \$ 26 billion and drew three times the number of anticipated investors, many of whom immediately tripled their money. As a result investments in the stock market have grown since 2002 from 50,000 investors to more than 750,000 with much of the growth coming from rural areas. The exchange's total value jumped from \$ 1 billion to \$ 12 billion; an amount that is predicted to swell again following the biggest initial public offering in Kenyan history of cell phone giant Safaricom where it is expected that as many as 3 million individual investors will buy.²⁷

²⁷ The Washington Post, "Everyday Kenyan Taking Stock in a Growing African Economy", August 26, A15

Natural resources rich countries such as Iraq, Venezuela, Chile, Peru, Congo and South Africa, just to name few, could easily empower their poor people by directly transferring property of their oil or minerals.²⁸

Incentives to informal businesses: People take rational decisions. If the costs of doing something exceed the expected benefits they are likely to refrain from action. The informal businesses have many reasons to be so. Of paramount importance are the high costs of becoming formal, but different evidence shows that even when the costs are low informal businesses can remain as such. In some cases the reason for that is lack of knowledge of the benefits the formal market has to offer. But in many cases it is the lack of tangible, short term benefits to formalize. For many informal businesses the formal market is complicated and inaccessible. In some cases, governments have successfully explored incentives of some nature to motivate formalization. One of those experiences relates to separation of government procurement opportunities for businesses of certain size and of recent incorporation.²⁹ In the United States the Government sets aside contracts for small businesses previously certified. In Chile, a program aimed at helping the poor offers training and grants to set up small businesses.³⁰

²⁸ For an example of how this can be undertaken, See Garcia-Bolivar, Omar. 2007. Entre la Libertad y la Igualdad: Una propuesta de fortalecimiento para los pobres de Venezuela, Revista del Tribunal Supremo de Justicia, No. 24. Caracas, Venezuela.

²⁹ USAID, Land and Business Formalization for Legal Empowerment of the Poor, strategic overview paper, January 2007 at 58.

³⁰ The Economist, Aug 18, page 23.

Likewise, in areas where imperfections in the labor and land markets artificially depress laborer wage rates and raise land prices to the extent that the poor are precluded from purchasing land, programs subsidizing the purchase of agricultural land by the poor, or programs providing tax credits to financial services cooperatives extending credit to the poor, serve as enabling processes.³¹

- Dispute settlement.

Enhancement: Dispute settlement can be improved by law reforms, simplifying processes and creating more accessible and user-friendly adjudication opportunities. They can also provide other more promising approaches to dispute settlement, including alternative dispute resolution (ADR, emphasizing mediation and arbitration) and opportunities for field adjudication of rights, such as those during systematic land titling. Law reforms can also establish institutions and mechanisms that help the poor hold to account those who administer the law. These would include creating ombudsmen or community watchdog groups to supervise the performance of local officials, or creating the right to file complaints and call public meetings that local officials are required to attend and respond to grievances. These innovations all require law reform, even in the case of ADR (which is consensual), because legal authorization is needed for the state to fund ADR and to ensure court enforcement of resolutions arrived at through this process.³²

³¹ See Deininger, Klaus. 1993. *Land Policies for Growth and Poverty Reduction*, Washington, DC: The World Bank (pp. 115–31).

³² USAID, Legal Empowerment of the Poor: From Concepts to Assessment, March 2007 at 25

Likewise, laws that allow for other than documentary proof of contracts and transactions such as oral evidence; require public consultation or create rights to a public hearing; require an opportunity to be heard or comment for those directly affected; allow representation other than by a registered legal practitioner; and create minimum notice periods before prejudicial actions are taken enhance the rights of the poor to settle disputes.

Elimination of costly steps and formalities such as the need for photocopies or notarization, has proven to be significant for enforcing people's rights.³³ The language used in paperwork can also pose an obstacle; an extensive study of the primary causes for the proliferation of the extralegal economy in Tanzania found that the majority of documents necessary to legally operate a business in that country are found only in English, whereas a majority of the country's citizens speaks only Kiswahili or tribal languages.³⁴

Thus, there is no question that major reforms of the contract enforcement mechanisms are crucial to empower the poor. In Serbia and Montenegro, the civil procedure and enforcement of judgment laws were reformed. Now a debtor has only three days to file an appeal after a judge's ruling, and the judge has three days to decide on the merits of the

³³USAID, Legal Empowerment of the Poor: From Concepts to Assessment, March 2007 at 26

³⁴ Institute for Liberty and Democracy. 2005. Program to Formalize the Assets of the Poor of Tanzania and Strengthen the Rule of Law. Lima, Peru: ILD.

case. Previously, it took ten months to appeal and obtain a judgment. In Burundi, a summary procedure for debt recovery was introduced and private bailiffs can undertake enforcement. Likewise, other African countries, like Rwanda, have created specialized chambers in trial courts for litigation related to business, financial, and tax matters that are presided over by a judge as opposed to the previous three-judge jury. This has reduced the costs of enforcing contracts by 15%. Summary proceedings to enforce collaterals have proven to substantially reduce the costs and time involved in dispute settlement. In some countries, only 2 pieces of evidence are required. Albania introduced a summary proceeding in 1999. With a registered collateral agreement in place, a creditor may seek an enforcement order from the court when a borrower defaults, after giving the debtor five days' notice. The order is then issued within a few days. An execution officer may then seize the collateral and deliver it to the creditor. Enforcement takes less than a month. Bulgaria, India, and Romania all have introduced similar proceedings. Such reforms are especially successful when they limit grounds for appeal and allow enforcement to proceed pending appeal.³⁵

ADR mechanisms such as arbitration, mediation, or conciliation can be useful in bypassing inefficient rights enforcement mechanisms,³⁶ but a decision then may become a new counter on the bargaining table or, if the loser is powerful enough, it may simply be ignored. For example, in Central America, the potential benefit of arbitration to reduce

³⁵ World Bank Doing Business 2006

³⁶ Field, Martha A. and William W. Fisher III. 2001. *Legal Reform in Central America, Dispute Resolution, and Property Rights*. Harvard Studies in International Development (pp. 161).

the burden on the judicial system is eclipsed by the requirement that arbitral awards be enforced by traditional courts.³⁷

However, there is a potential utility in associating binding arbitration provisions with certain contractual agreements in order to lessen the burden on formal courts. Besides reducing the administrative burden on judicial systems, binding arbitration is a useful catalyst for the formation of commercial associations within a country. Georgia, the country that realized the greatest year-to-year gain in the 2007 World Bank Governance Indicators, has not only rewritten its labor regulations to provide mobility for workers and reduced the required entitlement contributions made by employers, it has also set up specialized commercial courts using ADR to allow willing firms to resolve disputes by means other than the formal judicial system (which is of poor quality).³⁸

Specialization and ease of access may also improve dispute settlement. Experience has shown that specialized courts are much more efficient in this area. For example, Rwanda created specialized chambers in trial courts for litigation related to business, financial, and tax matters. It was able to reduce delays by 22%.³⁹ In other cases, small claims courts have proven useful in creating accessible mechanisms to enforce rights.

³⁷ Garcia-Bolivar, Omar. 2006. Dispute Resolution Process and Enforcing the Rule of Law: Is Arbitration a Viable Alternative to Solving Disputes in Central America? *Southwestern Journal of Law and Trade in the Americas*. Vol. 12.

³⁸ During the period Georgia was able to reduce the unemployment by 2%. World Bank and International Finance Corporation. *2007 Doing Business 2007: How to Reform*. <http://www.doingbusiness.org/>.

³⁹ World Bank, *Doing Business*, 2006.

Decentralization is an important element toward making justice accessible to everyone in all parts of the country.⁴⁰ In remote areas of Brazil, until mobile courts were implemented, it had been impossible to access the judicial system.⁴¹ In the absence of effective dispute settlement mechanisms, people resort to their own ways of enforcing rights. Experience with customary rules and tribal chiefs as instruments of enforcing rights in some parts of Africa has been positive.⁴²

In many countries, mechanisms have been designed to avoid the courts to enforce certain rights through agreements of the parties. That is the case of Albania, where in the context of moveable guarantees, parties can agree that the lender can take possession of the collateral directly with no need of court intervention if the borrower defaults.⁴³ In other cases, court procedures have been reformed, experience showing that an oral process tends to be more transparent and faster than written dispute settlement, a factor that

⁴⁰ Messick, Richard E. 1999. Judicial Reform and Economic Development: A Survey of the Issues. *World Bank Research Observer*, Vol. 14, No. 1. February (pp. 122).

⁴¹ Ibid

⁴² Tanner, Christopher. 2002. Law-Making in an African Context: The 1997 Mozambican Land Law. FAO Legal Paper. Rome: FAO.

⁴³ Channell, Wade, Boris Divjak, et. al. 2004. Small and Medium Enterprise Interventions and Gap Analysis: Final Report. USAID, May (pp. 16); or Alston, L.J., G.D. Libecap, and B.Mueller, 1999. *Titles, Conflict, and Land Use: The Development of Property Rights and Land Reform on the Brazilian Amazon Frontier*, Ann Arbor, University of Michigan Press.

diminishes enforcement costs. In Venezuela, enforcing labor rights in courts used to take around 10 years. With the passing of a new law that promotes mediation and oral procedures, more than 80% of the labor disputes are settled before going to trial and court cases are now decided in no more than four months.⁴⁴

Enablement: Legal clinics and aid organizations have proved useful in helping the poor to enforce their rights; however, legal aid programs frequently lack funds to make their services available to all, are unknown by those that need it the most, or are not available in all locations.

Nevertheless legal aid, which provides low or no-cost legal assistance to the disadvantaged,⁴⁵ plays a central role in providing procedural assistance. Individuals and entities offering legal aid services are highly diverse and can include activities ranging from completing forms and deconstructing regulations to representing the poor in legal and administrative proceedings. Despite the diversity of potential activities, legal aid efforts usually share core objectives: in the area of procedural assistance, legal aid

⁴⁴ World Bank. 2004. World Development Report 2005: A Better Investment Climate for Everyone .Washington DC: World Bank at 87.

⁴⁵ Kessler, Mark. 1987. *Legal Services for the Poor: A Comparative and Contemporary Analysis on Interorganizational Politics*. New York: Greenwood Press. See for example, the key objective of South Africa's Legal Resources Centre, which is "[e]nabling the vulnerable and marginalized to assert and protect their rights" <https://www.lrc.co.za>.

bridges the gap between rights granted to poor populations and their ability to exercise those rights effectively.⁴⁶

As a process enabling legal empowerment, the bridge provided by procedural assistance must actively engage the poor rather than simply serve their legal needs. Most prominent of such engagement are programs that employ local residents to work as paralegals.

Paralegals serve not only as efficient providers of procedural assistance, but their presence in the community creates a local base of legal knowledge and experience with legal matters that can expand within those communities.⁴⁷

Legal aid clinics that train local traditional leaders and elders to serve as advocates for their constituents can create a powerful presence in their communities.⁴⁸ With a modest amount of training and appropriate incentives, court system employees can help the poor complete forms and fulfill processing requirements. Teachers and educated members of communities can assist with reading and interpreting legal documents.⁴⁹

⁴⁶ Committee on Legal Services for the Poor in Developing Countries, ed. 1974. *Legal Aid and World Poverty: A Survey of Asia, Africa, and Latin America*. New York: Praeger.

⁴⁷ USAID, *Legal Empowerment of the Poor: From Concepts to Assessment*, March 2007 at 21

⁴⁸ A World Bank-funded legal aid program in Kyrgyzstan trained local leaders to be successful advocates for their communities.
World Bank. 2003. *Legal Rights to Land for Rural Residents in Kyrgyzstan: Case Studies of Legal Rights Advocacy Empowerment of Local Leaders Project*. Bishkek: The World Bank (pp. 1–7).

⁴⁹ USAID, *Legal Empowerment of the Poor: From Concepts to Assessment*, March 2007 at 21

Integrating the poor in public processes and environments is usually a more individualized method of enabling and creating rights awareness than technical revisions to legal language and legal literacy campaigns. Least controversial are integration methods that pull another chair up to the table by consciously including the poor in public processes.⁵⁰ Methods can be voluntary, such as policy makers canvassing the poor for opinions and priorities in the process of establishing policy, or government officials including the poor in decisions on the allocation of project benefits.⁵¹ Others methods of including the poor may be mandated, such as legislation requiring public notice and hearings in all communities to be affected by a public works project or private development with environmental impact.⁵²

Awareness: Efforts to make the expressions of law more accessible and allow awareness building include drafting laws using plain and simple words, printing laws with large, legible type, requiring laws (or summaries of longer laws) in all local languages, shortening legal procedures to essential steps, and disseminating laws and regulations

⁵⁰ Schneider, Hartmut. 2006. *Participatory Governance: The Missing Link in Poverty Reduction*, OECD Development Centre Policy Briefs, No. 17, OECD Publishing doi:10.1788/888041015581 (pp. 7).

⁵¹ See e.g., Claeys, Anja. 2001. Engaging the Poor in Policy-Making on Poverty and Social Exclusion in Flanders (Belgium), OECD Working Paper (pp. 129–133). At <http://www.oecd.org/dataoecd/54/10/2537007.pdf>.

⁵² See e.g., South Africa's mandatory public participation processes contained in the 1998 National Environmental Management Act (NEMA).

throughout relevant jurisdictions and in all tribunals with particular attention to those handling cases involving the interests of the poor.⁵³

Other mechanisms that can assist the poor are group-based action strategies to encourage rights enforcement, toll-free hotlines that provide immediate information on rights enforcement options and procedures, ombudsmen or other officials dedicated to serving the poor in justice institutions, police stations and public health offices.

Legal literacy campaigns share the objectives of rights awareness: imparting knowledge of legal rights and the exercise of those rights. These campaigns tend to be conceived and executed with relation to specific projects or in the context of broader programs, such as the countrywide formalization of land rights or establishment of legal aid offices in an urban center. Campaign methods include educational messages disseminated through the public media and training programs for providers of services and benefits to the poor, including government officials, professionals, and members of civil society.⁵⁴

⁵³ Comprehensive guidelines for creating comprehensible legislation and legal documents are included in Sandeep Dave's *Plain Language in Law*, at www.llrx.com and www.plainlanguage.gov, a 2002 US government mandate that all legislation must be written in plain, concise language in order to make it more responsive, accessible, and understandable to the public (see <http://www.plainlanguage.gov/whatispl/govmandates/memo.cfm>).

⁵⁴ Asian Development Bank, 1999. Technical Assistance for Legal Literacy for Supporting Governance. Manila: ADB.

Less visible at a national level but potentially highly effective are community-based legal literacy efforts. Operating at the local level, planners can tailor a campaign to the needs of a particular population, which in turn can suggest and generate the content for the campaign.⁵⁵ Local legal literacy campaigns can range from community workers advising self-help groups of domestic violence laws to a performance of a touring theater troupe advocating the right to vote. Campaigns may include a mixture of approaches: coping with a public health crisis, a health ministry may broadcast a radio announcement nationally to alert its citizens to the legal rights of HIV-positive individuals while a local NGO advises patients in a village clinic how to file a claim against their employers for unpaid wages when their illness prevents continued work. Effective legal education should use media that engage the interest of those to be informed; cartoons that highlight legal problems and solutions are a good example.

Selecting the most effective method to create and increase awareness of legal rights begins with identifying the intended audience. The size, composition, and characteristics of the audience will shape the content and ultimately narrow choices for effective methods for communication of the message.⁵⁶ If a targeted poor audience lives and works in a community with no television or radio and high illiteracy, campaigns may use posters illustrating the message with graphics or rely solely on personal contact. If the audience is economically and socially diverse, campaign designers must identify barriers

⁵⁵ USAID, *Legal Empowerment of the Poor: From Concepts to Assessment*, March 2007 at 19.

⁵⁶ *Id.*

faced by marginalized sections and consider creating and delivering communications separately to those groups.⁵⁷

In addition to communications intended for the poor, campaigns may need to raise legal awareness among those who interpret and administer the law, including judges, lawyers, police, and administrative officials. In some settings, campaigns effectively target traditional leaders in order to raise awareness of formal law in an effective and respectful manner, while also exploring possible ways of merging or otherwise reconciling customary and formal law in a manner designed to establish, extend, and protect the rights of indigenous populations, including women and other marginalized persons.⁵⁸

Sometimes countries need to market the benefits that legal empowerment actions bring about. In El Salvador a law that promotes the use of ADR was passed, arbitration centers were created but there was no demand. The users were unaware of the benefits of an ADR system. Moreover, those that knew were skeptical. As a result few people uses the arbitration centers, few people know of it and those that know believe arbitration is something useful for the big disputes of the rich and of companies. The government shares that belief and is reluctant to submit disputes to arbitration and the courts are sympathetic to actions aimed at hindering arbitration cases. A good marketing campaign focused on the benefits of ADR and aimed at the users of little income would have overturned that trend.

⁵⁷ Id

⁵⁸ Id

In designing campaigns, planners often need to balance the need to reach a large audience with the need to ensure understanding among the poor. The broader the dissemination area, the more diverse the audience will be, requiring a more generic message.⁵⁹ Smaller audiences allow for more tailored messages that can provide information about the methods of exercising legal rights specific to a community, but may not reach a significant number of people. This challenge of promoting legal literacy is further confounded in countries with many languages and no widely-known national language.

- Political.

Voice in making: Laws that enhance freedom to organize for political purposes; extend the right to vote; eliminate barriers to voting (such as identity documentation that works against the poor); require that ballots and information be available in local languages; enable citizens to hold their elected officials accountable; and provide for citizen participation in local budgeting.

Identity programs are crucial. Lack of identity usually equals lack of voice. Without identity there is no citizenship and hence no political rights to participate in the decision making. Property rights cannot be secured without identity and workers are easy to be abused if they lack identification. But reforms are feasible. In the Democratic Republic of Congo more than 25 million people received legal identity during an active campaign for

⁵⁹ Id at 20

registration for the 2006 election. In Cambodia, the number of registered citizens has increased from 5 per cent to 85 per cent in a few years with a programs organized by the civil society with the support of the government.

Participation: The right to participate in decision-making and in shaping the set of social rights to meet their particular is essential.⁶⁰ Absent that engagement, any enabling process has the potential to deflate and its ability to encourage empowerment reduced to that of any other benefit program.

One of the distinguishing features of capacity building programs within a framework of legal empowerment is the effort to establish opportunities for the poor to participate in public processes representing their own interests. User groups, cooperatives, and coalitions often serve as the foundation, with those groups in turn supplying representatives to decision-making bodies. Establishing forums in which the poor and members of institutions such as local government meet regularly to address issues and discuss possible solutions creates opportunities to institutionalize the process of capacity building even as the group addresses the issues of the community and might be a good way to build consensus.⁶¹

- Social.

⁶⁰ See Deininger, Klaus. 1993. *Land Policies for Growth and Poverty Reduction*, Washington, DC: The World Bank (pp. 115–31).

⁶¹USAID, Legal Empowerment of the Poor: From Concepts to Assessment, March 2007 at 24

Health and education can be improved so that people can use their rights. In both Mexico and Brazil one family in five now receives a small monthly stipend from the government, provided they keep their children in school and take them to health checks. Mexico's "Oportunidades" (formerly PROGRESA) program helps poor families finance educational and health costs, and Brazil's "Programa Nacional de Bolsa Escola," and "Programa Bolsa Alimentação," offer education and nutrition subsidies, respectively. Results from Mexico, where Oportunidades covered 4.2 million rural and urban families at the end of 2002, show enrolments in middle schools increasing from 67 percent to about 75 percent for girls, and from 73 percent to about 78 percent for boys as a consequence of the program. Health and nutrition results are even more striking. Height growth among infants in the crucial 12-36-month range increased by about 1 cm per year - in an environment in which the incidence of stunting was at 44 percent of the infant population before the program began. And, as a result of increased visits to medical providers, illness among newborns decreased by 25 percent, among infants aged under two by 19 percent and among children aged three to five by 22 percent.⁶² In sum, the healthier and better educated are in a positive position to use the legal tools and exercise their rights.

B. Indicators.

⁶² Inequality in Latin America & the Caribbean: Breaking with History?, World Bank, 2003

Indicators significantly facilitate the ability to assess change and progress by allowing direct comparison of their states over time. Quantitative indicators tend to be especially attractive because they permit measuring change with greater degrees of precision and are easy to compare and record. Objective indicators likewise facilitate comparison.

Developing indicators for LEP and periodically populating them with data would suggest whether a country's policies and investments are contributing to legal empowerment or disenfranchising the poor even further. Over time, such measures can be used to help countries realize the need to make corrections. Time series indicators can also suggest how committed a country is to change and even serve to motivate that change. This is especially so when several countries are measured according to the same criteria and the results of these assessments are made public. Hence, LEP indicators could have a role in forging legal empowerment of the poor where vested interests might otherwise stymie its realization. The World Bank's Doing Business report is an example of how indicators have been effective in motivating country commitment to reform.⁶³

C. Consensus.

Finally political leadership, international support and involvement of the private sector are fundamental. To reach consensus of the policies to legally empower the poor requires political will, financial commitment and public support. No single sector can achieve all those factors by itself. The need to build an international consensus on policies that have

⁶³ USAID, Legal Empowerment of the Poor: From Concepts to Assessment, March 2007 at 32.

proved useful to empower the poor should not be underestimated. Likewise, legal empowerment programs should take place in consultation with the poor, customizing the best practices to each country's unique reality and in tune with holistic approaches to alleviate poverty.